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No. 08-52

Supreme Court, U.S.
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# In The Supreme Court of the United States

ROBERT STEINBUCH,

*Petitioner,*

v.

HYPERION BOOKS, DISNEY PUBLISHING WORLDWIDE, and HOME BOX OFFICE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENTS HYPERION, AN IMPRINT OF BUENA VISTA BOOKS, INC., AND DISNEY PUBLISHING WORLDWIDE

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## QUESTIONS PRESENTED

I. Whether petitioner has presented compelling reasons to grant the petition where the Eighth Circuit applied this Court's personal jurisdiction precedents to the facts in the record and held that petitioner failed to demonstrate a *prima facie* case that the respondents were subject to personal jurisdiction in Arkansas, and its opinion does not conflict with a decision of this Court or a Court of Appeals, and where the opinion below does not implicate an important federal question that has not been settled by this Court.

II. Whether petitioner has presented compelling reasons to grant the petition where the Eighth Circuit's opinion held that petitioner was not entitled to discovery on the issue of specific personal jurisdiction because petitioner offered only conclusory and speculative allegations supporting jurisdiction and did not contradict the affidavits of respondents with competent proof, where the Eighth Circuit remanded the case to permit petitioner to conduct discovery limited to general personal jurisdiction over respondent Hyperion even though petitioner did not seek to conduct discovery limited to jurisdictional issues when the case was before the District Court, and where the opinion is not in conflict with a decision of this Court or a Court of Appeals and does not implicate an important federal question that has not been settled by this Court.

## CORPORATE DISCLOSURE STATEMENT

Hyperion, an imprint of Buena Vista Books, Inc., states that it is a subsidiary of Disney Publishing Worldwide, which is an indirect subsidiary of The Walt Disney Company, a publicly traded company.

Disney Publishing Worldwide states that it is an indirect subsidiary of The Walt Disney Company, a publicly traded company.

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## COUNTERSTATEMENT OF THE CASE

### I. Statement of Facts

Petitioner Robert Steinbuch filed suit in the United States District Court for the Eastern District of Arkansas against, among others, respondents Disney Publishing Worldwide ("DPW") and Hyperion, an imprint of Buena Vista Books, Inc. ("Hyperion") (collectively, the "respondents"). Hyperion and DPW are both California corporations with their principal places of business in California. Hyperion is a subsidiary of DPW. In his complaint, Mr. Steinbuch made no jurisdictional allegations against Hyperion or DPW. He sought damages for invasion of privacy and intentional infliction of emotional distress based on the publication of *The Washingtonienne*, a work of fiction published by Hyperion in June 2005.

In addition to the respondents, Mr. Steinbuch sued Jessica Cutler, who wrote the novel *The Washingtonienne*.[1] For a brief time during 2004, Ms. Cutler posted a weblog or "blog," also called "The Washingtonienne," in which Ms. Cutler described her dating life and sexual relationships in and around Washington, D.C. with several men, including one she referred to as "R.S." In May 2005, before the publication of the novel *The Washingtonienne*, Mr. Steinbuch sued Ms. Cutler in Washington, D.C. for invasion of

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[1] The Eighth Circuit Court of Appeals has stayed Mr. Steinbuch's appeal of the District Court's dismissal of Ms. Cutler pending her bankruptcy proceedings.

privacy and intentional infliction of emotional distress, claiming in his publicly-filed complaint that he was "R.S." and confirming that he had a sexual fling with Ms. Cutler when they both worked in the same office in Washington, D.C.[2] The novel *The Washingtonienne* is a work of fiction, and, as the Eighth Circuit Court of Appeals correctly noted, "[t]he novel concerns fictional characters and does not refer to Steinbuch by name or by his initials."[3]

Mr. Steinbuch was a resident of Arkansas at the time he filed his complaint in May 2006, but he did not have any connection to the State of Arkansas prior to his accepting employment in Arkansas. Mr. Steinbuch presented no evidence to the District Court that he was a resident of Arkansas at the time *The Washingtonienne* was published, nor did he make such an allegation in his complaint.

In response to petitioner's complaint, both Hyperion and DPW presented evidence in the form of affidavits that neither entity had jurisdictional contacts in Arkansas.

Hyperion's affidavit states that it has no employees or agents in Arkansas; it has no bank accounts,

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[2] *Steinbuch v. Cutler*, United States District Court for the District of Columbia No. 1:05-cv-00970-PLF.

[3] *Steinbuch v. Cutler*, 518 F.3d 580, 583-84 (8th Cir. 2008). A copy of the opinion is attached as Appendix A to the petition for writ of certiorari ("Pet. Appx. A"), and citations to the opinion in this brief are to that copy of the opinion.

telephone listings, real estate, or personal property in Arkansas; it has no office in Arkansas; and it has no agent for service of process in Arkansas.

Hyperion also submitted an affidavit stating that it contracted with Time Warner Book Group, Inc., which is now Hachette Book Group ("HBG"), for the distribution of books published by Hyperion. Hyperion does not own HBG and they are not joint ventures. HBG had the exclusive right to distribute *The Washingtonienne*. The distribution agreement with HBG provided for broad distribution of Hyperion's titles, including *The Washingtonienne*. Hyperion's affidavit stated that it did not direct HBG to target any of its books for distribution in the State of Arkansas or in any specific region of the country, nor did Hyperion directly sell *The Washingtonienne* to any consumers in Arkansas or any other state.

DPW stated in its affidavit that during the relevant time period, that is, from the time *The Washingtonienne* was published through the time of the petitioner's filing of his complaint, DPW had no bank accounts, telephone listings, real estate, or personal property in Arkansas; it did not maintain an office in Arkansas; and it had no agent for service of process in Arkansas. In September 2006, four months after Mr. Steinbuch filed his original complaint, and well after the petitioner's alleged cause of action arose, DPW registered to do business in Arkansas. DPW's affidavit also stated that it did not publish or distribute *The Washingtonienne*. It did not contract with Ms. Cutler for the publication of *The Washingtonienne*, and

it did not make any payments to Ms. Cutler. DPW did not contract with Time Warner Book Group, Inc., HBG, or any other entity for the distribution of *The Washingtonienne*.

The affidavits also stated that Hyperion and DPW are separate corporate entities. Hyperion is not an agent of DPW, and it does not hold itself out to be an agent of DPW. Hyperion and DPW maintain separate books, records, and accounts. DPW does not control the business operation and affairs of Hyperion, and it does not approve significant business decisions made by Hyperion. The only connection DPW has to this action is that it is the corporate parent of Hyperion.

In opposition to the respondents' affidavits, the petitioner submitted no affidavits of his own or other testimony or competent evidence to demonstrate that Hyperion and DPW had any affirmative contacts with Arkansas. Instead, he cited newspaper articles and advertisements from publications outside of Arkansas, such as Cleveland, Ohio and Hartford, Connecticut, that loosely mentioned "Disney" and Hyperion together. He also attached a list of books published by Hyperion found in Arkansas stores. The petitioner also tried to demonstrate involvement by DPW in this matter by citing the margins of the distribution agreement between Hyperion and HBG in which a footer at the bottom of each page read "CFR/Disney Agreement. 12.04.03(v5)." As the Eighth Circuit correctly observed, however, in finding that DPW was not a party to the distribution agreement, "the plain

language of the agreement excludes 'books published by [Hyperion's] parent company, The Walt Disney Company, and companies which are owned or controlled by The Walt Disney Company (other than [Hyperion]).'" *Steinbuch*, Pet. Appx. A, p. 17.

## II. Procedural History

Hyperion and DPW moved to dismiss under Rule 12(b)(2) of the Federal Rules of Civil Procedure for lack of personal jurisdiction based on the facts outlined above. The record below shows that Mr. Steinbuch had ample opportunity to move for jurisdictional discovery but failed to do so. The petitioner asked counsel for DPW and Hyperion to agree to an extension of time of nearly three months to respond to the motions to dismiss. DPW and Hyperion were agreeable to this lengthy extension, but only if petitioner would agree to stay discovery until the motions were decided so as to avoid broad discovery requests and risk waiving their personal jurisdiction claims. DPW and Hyperion also offered to consider a shorter extension of time for Mr. Steinbuch to respond to the pending motions without a stay of discovery. Mr. Steinbuch refused both offers and moved the District Court for a three-month extension of time to respond to the pending motions. Hyperion and DPW moved to stay discovery pending a decision on the motions. The District Court permitted Mr. Steinbuch a two-month extension of time to respond to the motions to dismiss and also granted the respondents' motion to stay discovery. As the Eighth Circuit Court observed, in

his opposition to respondent's motion for a stay of discovery, Mr. Steinbuch "made no explicit request to conduct limited discovery tailored to the specific issue of personal jurisdiction." *Steinbuch*, Pet. Appx. A, p. 5. Mr. Steinbuch did not state in his opposition to the respondents' motions to dismiss that he needed jurisdictional discovery to respond to the motions, much less state with specificity what discovery he would need, and he never filed a motion with the District Court, as he was entitled to do, seeking leave to serve discovery limited to jurisdictional issues on Hyperion or DPW.

The District Court granted the respondents' motions to dismiss, finding that Arkansas lacked specific personal jurisdiction over Hyperion and DPW because Mr. Steinbuch's alleged injury and cause of action did not arise out of the respondents' contacts with the State of Arkansas. The District Court also found that it lacked general personal jurisdiction over Hyperion and DPW because the respondents' contacts with the State of Arkansas were not continuous, systematic, and substantial.

Mr. Steinbuch appealed. The Eighth Circuit affirmed the dismissal as to DPW for lack of both general and specific jurisdiction and affirmed the lack of specific jurisdiction over Hyperion, but remanded on the issue of general jurisdiction over Hyperion.

In affirming dismissal for lack of general jurisdiction over DPW, the Court of Appeals found that Mr. Steinbuch failed to set forth "factual" and "credible"

evidence to refute DPW's affidavits denying continuous and systematic contacts with Arkansas. It specifically held that the petitioner

> failed to meet his burden of proving jurisdiction by providing any affidavits, testimony, or documents in response to [DPW's] affidavit denying control over Hyperion and challenging personal jurisdiction. Steinbuch merely submitted various newspaper articles which referred to Hyperion/Disney as publisher of *The Washingtonienne*. The articles did not establish that Disney controls Hyperion and therefore did nothing to refute Disney's affidavit.

*Steinbuch*, Pet. Appx. A, p. 16-17.

The Court of Appeals also held that the District Court did not err in refusing to exercise specific jurisdiction over DPW, finding that there was credible evidence to show that DPW played no role in the publication or distribution of *The Washingtonienne* and that the petitioner failed to present any evidence that DPW had any connection with the dispute, but rather offered only conclusory and speculative assertions.

The Court of Appeals also affirmed the District Court's finding that it lacked specific personal jurisdiction over Hyperion, finding that Mr. Steinbuch did not present evidence that he was a resident of Arkansas when his cause of action arose, that is, when *The Washingtonienne* was published, and because "Steinbuch's cause of action appears to have no direct

connection with the forum state or to have arisen out of or relate to Hyperion's activities in Arkansas." *Steinbuch*, Pet. Appx. A, p. 10.

On the issue of general jurisdiction over Hyperion, however, the Eighth Circuit found that, since the petitioner submitted a list showing that some Hyperion books were sold within Arkansas, and because the distribution agreement, while not specifically targeting any state, left open the possibility that Hyperion could play a role in the marketing and distribution of its books, there was a possibility that Hyperion "might" have reasonably expected their distribution in Arkansas. *Steinbuch*, Pet. Appx. A, p. 15. The Court of Appeals noted, however, that the record did not contain "sufficient proof for a *prima facie* case of general personal jurisdiction over Hyperion." *Steinbuch*, Pet. Appx. A, p. 15. It noted that the petitioner "has not shown enough specifics about the quality and quantity of Hyperion's contacts with the state or the publisher's exploitation of the Arkansas market." *Steinbuch*, Pet. Appx. A, p. 15. The Court of Appeals thus remanded "for an opportunity for tailored discovery to elicit whether [Hyperion's] contacts with Arkansas were so continuous and systematic as to warrant general personal jurisdiction over the publisher." *Steinbuch*, Pet. Appx. A, p. 15.

The Eighth Circuit denied Mr. Steinbuch's petition for rehearing and his motion to stay the mandate pending his petition for a writ of certiorari. Upon remand, Mr. Steinbuch moved to transfer his case against Hyperion to Washington, D.C. The District

Court denied the motion to transfer. Limited discovery on the issue of general jurisdiction over Hyperion in Arkansas, pursuant to the Eighth Circuit's mandate, has begun in the District Court.

## REASONS FOR DENYING THE WRIT

### I. The Court of Appeals Applied This Court's Personal Jurisdiction Precedents, and the Decision Does Not Conflict with a Decision of This Court or Implicate an Important Federal Question That Has Not Been Settled by This Court.

This case represents a routine and proper application of this Court's jurisdictional precedents. There is nothing extraordinary about the way the Court of Appeals considered the affidavits of the respondents' corporate officers against the absence of credible evidence offered by the petitioner, who presented no "affidavits, testimony, or documents" but rather only newspaper clippings that referred to the companies by informal names, and other speculative and conclusory material. *Steinbuch*, Pet. Appx. A, p. 16. Nor is there anything unusual or controversial in the way the Court of Appeals affirmed dismissal of DPW and found that there was no specific jurisdiction over Hyperion without ordering jurisdictional discovery. The petitioner never moved for jurisdictional discovery when he had the opportunity to do so in the District Court and, in any event, he failed to carry his burden by presenting sufficient evidence that discovery was

warranted. The Eighth Circuit Court of Appeals properly applied this Court's precedents in a way that is consistent with how such jurisdictional issues are handled in other Circuits. No important federal question is implicated, and there is no Circuit split. This Court should deny the petition for a writ of certiorari.

As this Court has explained, the power of a state to exercise jurisdiction over a nonresident defendant is limited by the Due Process Clause of the Fourteenth Amendment. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). Under the Due Process Clause, to subject a nonresident defendant to jurisdiction, the defendant must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Whether a forum state's exercise of jurisdiction over a nonresident defendant comports with the requirements of due process "depend[s] . . . upon the quality and nature of [its] activity" in the forum state. *International Shoe Co.*, 326 U.S. at 319. Accordingly, a personal jurisdictional analysis properly focuses on whether the nonresident defendant has the requisite "minimum contacts" with the forum, which "protects the defendant against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen Corp.*, 444 U.S. at 291; *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) ("[I]t is essential in each case

that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.").

It is the petitioner who has failed to recognize this Court's precedents by insisting on applying a simple "stream of commerce" theory to this case. The petitioner argues erroneously that because a defendant's products are ultimately sold in a state, a defendant is therefore subject to personal jurisdiction in that state. The Court's holding in *World-Wide Volkswagen* forecloses such argument because "financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State." 444 U.S. at 229. In order for a defendant's contacts with a state to be "constitutionally cognizable," it must be foreseeable "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297 ("[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State."); see also *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 113 (1987) (plurality opinion).

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. . . . [A] defendant's awareness that the stream of commerce may or

> will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

*Asahi Metal*, 480 U.S. at 113.

The opinions below analyzed Hyperion's and DPW's contacts with Arkansas to determine whether it was foreseeable that these respondents would be subject to jurisdiction in Arkansas under this Court's two theories of personal jurisdiction – specific jurisdiction and general jurisdiction. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984). "When a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." *Id.* at n. 8. On the other hand, "[w]hen a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the state [is] exercising 'general jurisdiction' over the defendant." *Id.* at n. 9. In order to support a finding of general personal jurisdiction, it is not enough that a defendant has some general presence in a state. Instead, a nonresident defendant's contacts with the forum must be "continuous and systematic." *Id.* at 415.

The Court of Appeals properly applied this Court's decisions in *Calder v. Jones*, 465 U.S. 783 (1984), which analyzed a claim of specific personal jurisdiction, and *Keeton v. Hustler Magazine, Inc.*, 465

U.S. 770 (1984), which examined a claim of general personal jurisdiction.

The defendants in *Calder* did not have the kind of continuous and systematic contacts with California necessary to support a finding of general personal jurisdiction, but because they had "intentionally directed" their activities at a resident of California they were subject to specific jurisdiction in that state. *Calder*, 465 U.S. at 789-90 (finding that defendants' intentional, and allegedly tortious, actions were expressly aimed at California"). Thus under *Calder*, in order to support a finding of specific personal jurisdiction, a nonresident defendant must intentionally direct his tortious activity to a resident of the forum state.

The Court of Appeals, following *Calder*, found that the petitioner failed to present sufficient evidence justifying an Arkansas court's exercise of specific personal jurisdiction over Hyperion and DPW because neither had targeted an Arkansas resident with tortious conduct. The Court of Appeals noted that under *Calder* petitioner "would have to show that Hyperion knew 'that the brunt of the injury would be felt by [him] in the State in which [he] lives and works.'" *Steinbuch*, Pet. Appx. A, p. 9 (quoting *Calder*, 465 U.S. at 789-90). But the petitioner failed to allege or present evidence that he was an Arkansas resident when his cause of action arose. The Court of Appeals correctly found that the "cause of action appears to have no direct connection with the forum state or to have arisen out of or relate to Hyperion's

activities in Arkansas." *Steinbuch*, Pet. Appx. A, p. 10 (applying *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

Petitioner states erroneously that he presented "evidence" of DPW's "direct involvement in the publication of the book." Petition for Writ of Certiorari 14. The Court of Appeals rejected this claim, stating that the petitioner "offered no credible evidence that [DPW] had any involvement in the publication or distribution of the novel and instead made merely conclusory allegations about [DPW's] alleged role." *Steinbuch*, Pet. Appx. A, p. 18. The Court of Appeals found that "[petitioner] merely submitted various newspaper articles which referred to Hyperion/Disney as publisher of *The Washingtonienne*. The articles did not establish that [DPW] controls Hyperion and therefore did nothing to refute DPW's affidavit." *Steinbuch*, Pet. Appx. A, p. 17.

The Court of Appeals also rejected the petitioner's other piece of "evidence," which consisted of a footer on the margins of the distribution agreement between Hyperion and its distributor that says "CFR/Disney Agreement.12.04.03." The Court of Appeals found that

> [e]ven a cursory look at the distribution agreement, however, shows that it was entered into by the distributor . . . and three publishers, not including Disney Publishing Worldwide. The plain language of the agreement excludes "books published by Publisher's parent company, The Walt Disney Company,

> and companies which are owned or controlled by the Walt Disney Company (other than Publisher)." The distribution agreement thus cannot serve to establish personal jurisdiction over [DPW].

*Steinbuch*, Pet. Appx. A, p.17. The Court of Appeals' determination that neither Hyperion nor DPW were subject to specific jurisdiction in Arkansas is consistent with this Court's precedents.

In *Keeton*, this Court considered whether a publisher that directly circulated 15,000 magazines a month in New Hampshire was subject to general personal jurisdiction in that state. The Court found that Hustler Magazine, Inc.'s "general course of conduct in circulating magazines throughout the state was purposefully directed at New Hampshire, and inevitably affected persons in the state." *Keeton*, 465 U.S. at 774. Thus, general jurisdiction over the foreign defendant was proper because it "purposefully availed" itself of the benefits and protections of doing business in New Hampshire. *Id.*; see also *Burger King Corp.*, 471 U.S. at 475 (citing *Keeton*, 465 U.S. at 774).

The Court of Appeals applied *Keeton* to find that petitioner failed to present any factual evidence to contradict DPW's affidavit, which established a lack of continuous and systematic contacts with Arkansas during the relevant time period. There was no factual evidence in the record to support a finding that DPW "purposefully availed" itself of the benefits and

protections of transacting business in Arkansas. *Burger King Corp.*, 471 U.S. at 475.

As for Hyperion, however, the Court of Appeals found that because the petitioner presented evidence that Hyperion books were for sale in Arkansas, and because the distribution agreement, while not targeting any specific state or region, held open the *possibility* that Hyperion engaged in marketing efforts with the distributor or received sales reports from the distributor, Hyperion "might have reasonably expected" that its books would be distributed in Arkansas. *Steinbuch*, Pet. Appx. A, p. 13-14. The Court of Appeals, however, correctly determined that although the evidence raised the possibility that Hyperion might be subject to general jurisdiction in Arkansas, the petitioner "has not adduced sufficient proof for a *prima facie* case of general personal jurisdiction over Hyperion." *Steinbuch*, Pet. Appx. A, p. 15. The Court of Appeals gave the petitioner a second chance to make that *prima facie* case by remanding to give petitioner "an opportunity for tailored discovery to elicit whether [Hyperion's] contacts with Arkansas were so continuous and systematic as to warrant general personal jurisdiction over the publisher." *Steinbuch*, Pet. Appx. A, p. 15. In rejecting the petitioner's simple stream of commerce theory and in ordering tailored discovery on whether Hyperion's contacts were so continuous and systematic as to warrant exercising general jurisdiction over it, the Court of Appeals applied this Court's precedents

under *Keeton* and *Burger King* in requiring the petitioner to meet his initial burden. The Court of Appeals' decision to remand is entirely consistent with this Court's precedent.

## II. The Decision of the Court of Appeals Does Not Conflict with a Decision of any Other Circuit Court of Appeals.

The Court of Appeals' decision is in harmony with the practice in other Circuits, which routinely denies jurisdictional discovery when a plaintiff presents nothing more than speculative and conclusory allegations in opposition to a motion to dismiss for lack of personal jurisdiction that is supported by affidavits. Petitioner attempts to create a Circuit split on the issue of whether or not a court should rely on a defendant's affidavit on a motion to dismiss for lack of personal jurisdiction, but, in fact, the issue is illusory and no such split exists. In his petition, Mr. Steinbuch relies exclusively on *Theunissen v. Matthews*, 935 F.2d 1454 (6th Cir. 1991) and *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) to argue that the opinion below is in conflict with the law of other Circuits. The Eighth Circuit's opinion, however, is consistent with these two Sixth Circuit opinions and differs only in the application of the law to different factual situations.[4]

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[4] Throughout his petition, Mr. Steinbuch misstates that *Theunissen* is a Third Circuit instead of a Sixth Circuit opinion.

In *Theunissen*, *both* the plaintiff and defendant submitted affidavits regarding jurisdiction, a factual situation not present here. *Theunissen*, 935 F.2d at 1458 ("[T]he parties have together submitted a total of five affidavits in support of their respective positions."). In *Theunissen*, the Sixth Circuit found that the trial court had erred by crediting the defendant's affidavits denying jurisdictional facts while ignoring the plaintiff's affidavits that affirmatively averred facts that would support jurisdiction. *Id.* at 1462-63. Because the affidavits were contradictory, the court held that an evidentiary hearing should have been held to determine which factual account was accurate. *Id.* at 1465. Here, because the petitioner failed to present any affidavits contradicting the factual assertions in respondents' affidavits, the procedural recommendation in *Theunissen* does not apply to this case.

On the issue of whether or not a remand for further jurisdictional discovery is warranted, *Theunissen* is in accord with the opinion below. The Sixth Circuit found that the district court did not abuse its discretion in denying the motion for further discovery because plaintiff already had an opportunity to conduct discovery but failed to do so. Here, Mr. Steinbuch did not even move for jurisdictional discovery even though he had an opportunity to do so. Based on *Theunissen*, it was not an abuse of discretion to deny Mr. Steinbuch jurisdictional discovery.

*CompuServe* is also factually distinguishable from this case and presents no substantive Circuit

conflict. In *CompuServe*, the Sixth Circuit faulted the district court for relying on the defendant's affidavit denying jurisdictional facts because in that case, unlike here, plaintiff had submitted a wealth of competent evidence that, collectively, made out a *prima facie* case of specific jurisdiction over the defendant. The Court of Appeals in *CompuServe* found that "there is no question" that defendant took affirmative actions that created a connection with Ohio in that case, including repeated and ongoing communications with CompuServe, an Ohio company, entering into a written contract with CompuServe, which provided for the application of Ohio law, and purposefully perpetuating his relationship with the Ohio company by using it to market his software in Ohio. 89 F.3d at 1262-65. *CompuServe* does not conflict with the Eighth Circuit's opinion in this case but rather highlights Mr. Steinbuch's failure to present any credible evidence to challenge the respondents' affidavits.

The opinion of the Court of Appeals below is also consistent with other Circuits regarding the burden on the plaintiff to present competent evidence, and not merely speculative and conclusory allegations, to withstand to a motion to dismiss for lack of personal jurisdiction and to be afforded the opportunity to take jurisdictional discovery. See, *e.g.*, *FC Inv. Group LC v. IFX Markets, Inc.*, 529 F.3d 1087, 1093-94 (D.C. Cir. 2008) (holding that a *prima facie* case of personal jurisdiction and requests for jurisdictional discovery "cannot be based on mere conjecture or speculation");

*Negron-Torres v. Verizon Communication, Inc.*, 478 F.3d 19, 27 (1st Cir. 2007) ("Because [plaintiff] has failed to make a colorable claim for personal jurisdiction, we have no reason to overturn the district court's denial of her request for jurisdictional discovery."); *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 277 (5th Cir. 2006) (affirming district court's denial of jurisdictional discovery where the discovery "would support the exercise of general, not specific, jurisdiction, something [plaintiff] has not alleged in this case"); *World Wide Ass'n of Specialty Programs and Schools v. Houlahan*, 138 Fed. Appx. 50, 52 (10th Cir. 2005) ("In the absence of an explicit, supported motion for discovery, this court cannot say that the district court abused its discretion in denying the request."); *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (noting that a district court may consider defendants' affidavits to assist it in its determination of a motion to dismiss for lack of personal jurisdiction); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981) ("In deciding a pretrial motion to dismiss for lack of personal jurisdiction a district court has considerable procedural leeway. It may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion."). There is no conflict between the Eighth Circuit's opinion in *Steinbuch* and the opinion of any other Circuit. The Court should deny the petition for writ of certiorari.

## CONCLUSION

Petitioner has not established any reason for this Court to grant his petition. The opinions below were fully consistent with the law governing personal jurisdiction established by this Court. The opinion of the Court of Appeals does not conflict with a decision of this Court or any Circuit Court of Appeals, and it does not implicate an important federal question that has not been settled by this Court. For all of these reasons, respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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